Supreme Court, U.S.
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No. 02-1221

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF PLAINTIFFS' STEERING COMMITTEE, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Amicus Curiae adopts the statement of the questions presented in the petition except to note with respect to question 1 that approximately 10,500 claims for interest will be affected by the outcome of this case as more particularly explained herein.

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INTEREST OF *AMICUS CURIAE*[1]

This brief is filed by plaintiffs' Steering Committee as *amicus curiae* in support of the Petition for Writ of Certiorari filed by United States Shoe Corporation. When the litigation of the challenge to the Harbor Maintenance Tax on exports (HMT) was commenced by a number of plaintiffs in the Court of International Trade, the Court called together a group of approximately 12 attorneys who had brought the suits to assist it in selecting a test case for the litigation of the challenge to the HMT. After this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), most of the group was formally constituted as a plaintiffs' Steering Committee (hereinafter: "Committee") under the aegis of the Court of International Trade. The Committee represents hundreds of exporter plaintiffs that have obtained refunds of the HMT who, like all similarly situated exporters, have a direct stake in the outcome in that case and the further proceedings before this Court herein. The Committee's members were selected by Judge Jane A. Restani to assist the Court in the case management of the many suits that were filed and the refund administration issues following the Supreme Court's decision in *United States Shoe* and the subsequent favorable decision in *Swisher International v. United States*, 205 F.3d 1358 (CAFC), *cert. denied*, 531 U.S. 1036 (2000)).

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[1] Petitioner has filed a global consent to the submission of *amicus* briefs in support of either party, which is on file with the Clerk. Respondents' letter consenting to the filing of this brief accompanies this filing. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Members of the Committee participated as *amicus curiae* in all stages of *United States Shoe* and worked closely with counsel for United States Shoe in coordinating the challenge in the Court of International Trade and the appellate courts. The Committee has also acted on behalf of the Court as the central information clearinghouse for the hundreds of other attorneys representing the many thousands of claimants challenging the imposition of the HMT.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case by the petitioner, United States Shoe Corporation.

SUMMARY OF ARGUMENT

There was manifest Congressional intent to provide for interest on HMT refunds as refunds of either a tax or duty (it is considered both under the enacting statute). The decision of the Supreme Court in this case held that the HMT was a tax and, for certain purposes, considered a Customs duty. Congress manifestly intended to award interest on such refunds under the provisions of the tax code awarding interest on tax refunds, 28 U.S.C. § 2411, and under the provisions of the Customs laws awarding interest on duty refunds, 19 U.S.C. § 1505. The decision of the Federal Circuit frustrates this congressional intent and is at odds with the decision of this Court recognizing the HMT on exports as an unconstitutional tax or duty on which interest should be refunded.

The impact of the decision in this case will affect the outcome of over 10,500 claims pending before the courts and the Customs Service. The failure to award interest is a gross injustice especially when viewed against the extraordinary delays by the Customs Service in refunding

the principal. In over half of the claims, not even the principal has been refunded notwithstanding the decision of the Supreme Court over five years ago holding the HMT on exports to be unconstitutional.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

INTRODUCTION

In this brief we hope to assist the Court by providing an overview of the complicated procedural history of this case and its impact on the interest issue. We also hope to demonstrate to the Court why the government has willfully delayed the issuance of refunds further exacerbating the injustice of the failure to award interest on the refund of this unconstitutional tax.

As a prelude to this overview, the Committee respectfully submits that the following are compelling reasons why the Petition for Writ of Certiorari should be granted:

- The decision of this Court in this case, 523 U.S. 360 (1998), affirmed the judgment of the Court of International Trade which awarded a money judgment of the Harbor Maintenance Tax "together with interest and costs as provided by law."
- For reasons advanced in the petition, the Constitution provides that interest should be awarded on refunds of this unconstitutional tax.

- As also contended in the petition, Congress provided for interest on a refund of the HMT whether it is deemed a tax, 28 U.S.C. § 2411, or a duty, 19 U.S.C. § 1505.
- The error of the Court of Appeals for the Federal Circuit in denying the award of interest will never become apparent by reason of conflicts with other circuits, because the Court of International Trade "has exclusive jurisdiction over challenges to the HMT." 523 U.S. 366, footnote 3; 28 U.S.C. § 1581(i)(4). See also 28 U.S.C. § 1581(a).
- The egregiousness of the injury to plaintiffs by reason of the failure to grant interest has been magnified by the willful refusal of the U.S. Customs Service to process refund claims by thousands of exporters on a timely basis.
- From the time the HMT was first imposed in mid 1987 until exporters were relieved from paying the tax after the decision of the Supreme Court in this case, exporters have paid collectively about 1.434 billion dollars in HMT.
- In the more than five years since this Court decided that the HMT was an unconstitutional violation of the export clause, less than half out of approximately 10,500[2] claims have even been reviewed by Customs much less the subject of full or partial refunds.
- The government can continue to act with impunity in its dilatory processing of the refund claims because it is not accumulating interest charges.
- The complicated jurisdictional hurdles to bringing an action to obtain a refund of the principal now prevent plaintiffs from being able to commence actions in the

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[2] The petition for the writ of certiorari understates the number of claims by only counting the administrative claims which numbered approximately 7,500. In addition to those administrative claims, approximately 3,000 claims are pending in the Federal courts. The total number of judicial and administrative claims, therefore, is approximately 10,500.

Court of International Trade to compel timely issuance of the refunds, even without interest.

- The award of interest on the pending claims in the courts and before Customs administratively has been conditioned by the Court of International Trade and the Customs Service upon a decision of the Courts mandating an award of interest.
- In the absence of the granting of this Petition for a Writ of Certiorari and a final resolution of the issue by this Court, the issue of interest will continue to clog the calendars of the Courts in related cases presently on appeal.
- The resolution of the interest issue by the Court in this case, the lead test case on the challenge to the constitutionality of the HMT, would likely resolve the question in many of those cases including *International Business Machines Corp. v. United States*, 201 F. 3d. 1367 (Fed. Cir. 2000), *reh. denied*, 2000 U.S. App. LEXIS 15299 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1183 (2001), 25 CIT ___, SLIP OP. 2002-17, 2002 Ct. Int'l. Trade LEXIS 16, *aff'd* 2003 U.S. App. LEXIS 5396 (Fed. Cir., March 19, 2003); *Hohenberg Bros. Co. v. United States*, 23 CIT ___, SLIP OP. 2000-172, 2000 Ct. Int'l. Trade LEXIS 173, *aff'd* 301 F. 3d 1299, 2002 U.S. App. LEXIS 17644 (Fed. Cir. 2002), *reh. denied*, 2002 U.S. App. LEXIS 24345 (Fed. Cir. Nov. 4, 2002); *Swisher International, Inc. v. United States and Sony Electronics Inc., and, Arbon Steel & Service Co., Inc. v. United States*, 178 F. Supp. 2d 1354, 24 CIT ___, SLIP OP. 2001-144, 2001 Ct. Int'l. Trade LEXIS 151, *judgment entered sub nom. Arbon Steel & Service Co. v. United States*, 25 CIT ___, SLIP OP. 2002-8, 2002 Ct. Int'l. Trade LEXIS 7, *aff'd* 315 F.3d 1332, 2003 U.S. App. LEXIS 337 (Fed. Cir. 2003); *Eastman Chemical Company v. United States*, Ct. No. 95-04-00568.

I. THE GOVERNMENT DID NOT RAISE THE INTEREST ISSUE IN THE FIRST APPEAL OF THIS CASE TO THE SUPREME COURT NOTWITHSTANDING THAT THE JUDGMENT FROM WHICH THE APPEAL WAS TAKEN PROVIDED A REFUND OF THE HMT "WITH INTEREST AS PROVIDED BY LAW."

From the outset, the question of interest was a vital issue in the case especially in view of the great period of time that the tax had been in effect and the likelihood of protracted litigation of secondary issues in the case. This is important to a consideration of the merits of the instant Petition for a Writ of Certiorari. It must be emphasized that the initial judgment of the Court of International Trade provided a refund of the HMT "with interest as provided by law." *United States Shoe Corp. v. United States*, 924 F. Supp. at 1192. That judgment was subsequently affirmed by the Supreme Court decision in this case. With full knowledge that it intended to challenge the interest award separately, the government remained silent on the interest claim throughout the appeal in the initial phase of this case confining its defense to the jurisdictional and constitutional issues. When Justice Ginsburg asked the Deputy Solicitor General during oral argument as to whether any cases were in the pipeline involving the issue, the government responded that there were none. 1998 US Trans LEXIS 58 at *19. To completely answer this question, this Court should have been advised that the interest question, the other half of the case, was in the pipeline and that subsequent to the initial decision in the Court of International Trade, Judge Restani had rendered a "MEMORANDUM OPINION" affirming the award of interest. *United States Shoe Corp.* v. *United States*, 20 CIT 206 (1996). While it is questionable that this separate action by Judge Restani, who was only one of the three judges who rendered the decision in *United States Shoe*, was

appropriate, this action resulted in the interest issue becoming the subject of separate litigation.

As a result of the unconventional bifurcation of the claim for the principal and interest by Judge Restani's Memorandum Opinion, the interest issue took on a life of its own. When this case was returned to the Court of International Trade for entry of a final judgment after consideration of plaintiff's motion for an order settling interest and costs, the Court awarded the principal and costs but stayed the award of interest pending appeal or the expiration of appeal time from the Memorandum Opinion issued as Slip Op 96-32, 22 CIT 613, 614 (1998). To complicate matters even more, the interest appeal in this case was further stayed pending a resolution of the interest issue in *International Business Machines Corp. v. United States*, *supra*, which remains pending.

II. THE FINAL RESOLUTION OF THE INTEREST ISSUE IN THIS CASE WILL LIKELY RESOLVE THE ISSUE IN APPROXIMATELY 10,500 CLAIMS PENDING BEFORE THE COURTS AND THE CUSTOMS SERVICE.

When a host of suits were commenced in the Court of International Trade in the latter part of 1994, the correct jurisdictional path to adjudication of the claims was far from clear. Most of the suits were commenced claiming jurisdiction under 28 U.S.C. § 1581(i). In some cases, exporters such as United States Shoe Corp. filed protests against the assessment of the HMT and claimed additional jurisdiction under 28 U.S.C. § 1581(a) as well as 28 U.S.C. § 1581(i). Yet another group of exporters brought suit claiming jurisdiction only under 28 U.S.C. § 1581(a) and followed a far more layered administrative process leading to denied protests which formed the basis for section 1581(a) jurisdiction. This last group followed the procedures which

were the subject of litigation in *Swisher International, Inc. v. United States*, 205 F.3d 1358 (CAFC, 2000) *cert. denied*, which was not allowed to proceed until after this Court's decision in the *United States Shoe* case.

Because the *United States Shoe* case involved a claim for jurisdiction under both section 1581(a) and section 1581(i), that case was selected by Judge Restani with the agreement of the Committee as the "test case". This resulted in an Order by the three judge panel in *United States Shoe* designating that case for adjudication of the issues and staying all other cases, including the *Swisher* case, pending resolution of the *United States Shoe* case. *United States Shoe Corp. v. United States,* 19 CIT 288 (1995). Because the Federal Circuit ultimately found jurisdiction in *United States Shoe* to lie only under section 1581(i), refunds could not be obtained on HMT payments made more than two years prior to the date on which the actions were commenced. 28 U.S.C. § 2636(i). Since most of these actions were commenced no later than the latter part of 1994, refunds were not possible under this jurisdictional basis for exports made prior to the latter part of 1992 and in most cases, much later dates. Ultimately, the award of interest under 28 U.S.C. § 2411 was reversed in the *IBM* case (while the interest question in this case remained stayed).

Now comes the *Swisher* case. It was only after the final decision was rendered by this Court in *United States Shoe* that Judge Restani permitted the *Swisher* case to proceed. *United States Shoe Corp. v. United States*, 22 CIT 880, 882 (1998).

As mentioned above, the *Swisher* case proceeded on a different procedural and jurisdictional track than even the section 1581(a) jurisdiction claimed in *United States Shoe.* In *Swisher*, a claim for a refund was first filed with Customs

pursuant to administrative procedures set forth in 19 C.F.R. § 24.24(f) covering all payments back to 1987 when the HMT was first imposed. Customs uniformly refused to recognize those claims and denied them summarily. Thereafter, protests under 19 U.S.C. § 1514, which are a pre-condition to section 1581(a) jurisdiction, were filed against the denial of the refund claims. Ultimately, those protests were denied and only at that time could actions be commenced in the Court of International Trade following the *Swisher* theory.[3] That jurisdictional theory ultimately succeeded. *Swisher International, Inc. v. United States, supra.* By reason of the fact that the refunds were ordered pursuant to jurisdiction under section 1581(a) in contradistinction to *United States Shoe* where jurisdiction was found only under section 1581(i), post summons interest was granted under 28 U.S.C. 2644.[4] However, pre-summons interest was denied for the same reasons that it was denied in *United State Shoe.* See, the claims resolution and refund procedure established by Judge Restani in the wake of the *Swisher* case, *Swisher International, Inc. v. United States,* 25 CIT __, Slip Op. 2001-29, 2001 Ct. Intl. Trade Lexis 35 (2001). Under this procedure, exporters with Swisher-type claims then pending in the Court of International Trade could obtain refunds of the principal with post summons interest but the stipulated judgments granted pre-summons interest only upon the condition subsequent of "a schedule set by the Court should trial or appellate court proceedings in any of the following

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[3] The denied protests in *United States Shoe* which formed the underlying basis of the claim for jurisdiction under section 1581(a) were protests against the assessment of the HMT itself rather than Swisher-type protests against the denials of the refund claims.

[4] Only approximately 250 exporters having Swisher-type claims pending in court were able to avail themselves of the opportunity to obtain post summons interest. Hence, virtually all of the 10,500 claimants have received no interest payments at all in connection with HMT refunds. Incredibly, the government has not even paid the principal, much less interest, to most of the claimants with pending Swisher-type claims.

cases, finally resolve that such interest is owing on HMT payments" naming those cases cited, *supra*, *Swisher International, Inc. v. United States, International Business Machines Corp. v. United States; Hohenberg Bros. Company v. United States, Sony Electronics, Inc. v. United States, United States Shoe Corp. v. United States, Arbon Steel and Service Co. v. United States, Eastman Chemical Company v. United States* [citation to court numbers omitted].

In the wake of this Court's decision in *United States Shoe,* Judge Restani implemented a similar claims resolution procedure under which refunds of the principal in claims under section 1581(i) could be obtained. *United States Shoe Corp. v. United States,* 22 CIT 737 (1998). Under that procedure, no post summons interest was granted and pre-summons interest was conditioned on the issuance of "a schedule set by the court should appellate court proceedings in *International Business Machines Corp. v. United States,* 1998 Ct. Intl. Trade Lexis 73, Court No. 94-10-00625 finally resolve that interest is owing on HMT payments." *Id.* at 741. The resolution of the interest issue in this case would likely impact heavily on the decision in the *IBM* case, which remains pending and which, upon information and belief, will be the subject of a petition for a writ of certiorari shortly. Thus, this case has the potential impact of resolving the interest issue for all 10,500 claims.

III. THE INORDINATE DELAY BY THE CUSTOMS SERVICE IN PROCESSING THE REFUNDS OF THE PRINCIPAL FURTHER DEMONSTRATES THE APPROPRIATENESS OF AN AWARD OF INTEREST ON THE CONSTITUTIONAL AND STATUTORY GROUNDS ADVANCED IN THE PETITION.

The fundamental unfairness of the refusal to award interest is further compounded by the extremely complicated procedural and jurisdictional background of the

case. When *Swisher* was favorably decided for the exporters by the Court of Appeals for the Federal Circuit and certiorari was denied, Customs stopped summarily denying the Swisher-type claims. It was at this point that Customs began its torpid administrative processing of the claims, over half of which remain untouched more than five years after this Court rendered its decision holding the tax unconstitutional. Those claims continue to be processed to this date at a snail's pace--according to the government at a rate of 300 per month and according to empirical evidence gathered by the Committee at a much slower rate of less than 200 per month. See, *Eastman Chemical Co. et al. v. United States,* 27 CIT ___, Slip Op. 2003-39, 2003 Ct. Intl. Trade Lexis 38 (April 3, 2003).

Furthermore, plaintiffs are precluded now from forcing these claims into Court since the claims for the earlier HMT payments are no longer possible under section 1581(i) by reason of the statute of limitations in 28 U.S.C. § 2636(i) and because the Swisher-type claims have not been denied, a necessary precondition to a right of protest and subsequent judicial review a la *Swisher* under section 1581(a). In other words, by now "processing" the Swisher-type claims instead of denying them summarily as in the past, the government gets to hold onto the unconstitutionally collected HMT for as long as it wants. When a group of frustrated plaintiffs brought an action for mandamus seeking an order requiring Customs to hire more personnel or to devote more presently employed personnel to process the Swisher-type claims, their motion for mandamus was denied. *Eastman Chemical Co., et al. v. United States, supra.* Plaintiffs are now kept out of Court on HMT claims filed after *Swisher* was decided and the government is sitting on the payments which were collected in violation of the Constitution. This includes the vast majority of HMT claims.

The claims which are processed do not award interest and are issued with a statement that interest would only be granted in the event of a future decision by the Courts holding that interest must be paid. In view of the fact that interest has been denied on both statutory and constitutional grounds by the lower courts, there is no pressure on the government to process the claims more quickly and this tardiness is rewarded by having the use of these funds and gaining interest thereon.

United States Shoe's petition for a writ of certiorari will control the outcome of over 10,500 claims. Interest will be awarded on 7,500 administrative claims if, and only if, the Supreme Court reverses the Federal Circuit by ruling that interest is due. Similarly, the availability of interest on approximately 3,000 judicial claims that follow in the footsteps of United States Shoe depends on the outcome of this petition and a decision of this Court. First, if the Supreme Court rules that United States Shoe were owed interest, then the court would, as a matter of course, remand *IBM* to the CIT with instructions to that Court to issue a decision consistent with the new rule of law set down in *United States Shoe*. IBM would accordingly receive interest, as would the approximately 3,000 similarly situated exporters.

Second, a victory for *United States Shoe I* in the Supreme Court would pave the way for these 3,000 companies to receive interest regardless of the effect such a victory would have on the fortunes of IBM. The terms of the stipulated judgments issued in the format prescribed by the claims resolution procedure following United States Shoe dictate that these 3,000 exporters will receive interest if "appellate court proceedings in [*IBM*] finally resolve that interest is owing on HMT payments" -- not that these exporters will be deprived of interest if IBM is so deprived. Indeed, Judge Restani explained specifically in a colloquy

with the Committee at the time the claims resolution procedure was under consideration that a win by IBM would be a win for all, and a loss by IBM would bind no other exporter. This is established practice in the CIT when that Court designates a "test case." In any event, the 3,000 court claims that involve executed stipulated judgments in accordance with the procedure constitute only about one third of the total interest at stake in the total 10,500 claims. Some of those exporters have claims totaling as much as $23 million.

In addition to the *IBM* case, other cases mentioned earlier are noteworthy and would also be resolved if this petition were granted: *Arbon Steel & Service Co. v. United States, supra*, and *Hohenberg Bros. Co. v. United States, supra*. Counsel for petitioners in the *Arbon* case and the *Hohenberg* case have requested, or will request, this Court to suspend action on their petitions for a writ of certiorari pending this Court's decision on *United States Shoe's* petition for a writ of certiorari. The plaintiff company in A*rbon* sought interest on HMT payments on grounds almost identical to those advanced by United States Shoe. Both the CIT and the Federal Circuit ruled against the plaintiff. See, *Arbon, supra*, 178 F. Supp. 2d 1354 (2001); *Arbon Steel & Serv. Co. v. United States*, Appeal No. 02-1299 (CAFC, January 10, 2003). On appeal to the Federal Circuit, Arbon advanced a novel argument that immunity of the United States from interest has never applied to overpayments of internal revenue taxes and that 28 U.S.C. § 2411 merely codifies that rule. The Federal Circuit rejected the argument noting (1) "the Supreme Court * * * has determined that section 2411 does not codify such a rule, but itself serves as a waiver of immunity (*Arbon* Appeal No. 02-1299, citing *Library of Congress v. Shaw*, 478 U.S. 310, 319); and (2) section 2411, which "relates to internal-revenue taxes, * * * does not apply here" because the tax laws do not

govern the HMT relying on its own decision in *IBM*, 201 F. 3d at 372.

The plaintiffs in *Hohenberg Bros. Co. v. United States, supra*, were also among those exporters who entered stipulated judgments to obtain refunds conditioned upon the *IBM* case under the post United States Shoe claims resolution procedures. Hohenberg and its co-appellants asked the Federal Circuit to modify their judgments in light of *Swisher*, so that they would be able to receive interest under 28 U.S.C. § 2644. The Federal Circuit held, however, that "[b]y executing the [consent] judgment, Hohenberg * * * expressly waived all future claims arising out of its HMT export payments against the government" (301 F. 3d 305) because the judgments included this clause: "upon entry of judgment, plaintiff releases, waives, and abandons all claims against the defendant * * * arising out of all HMT export payments." *Id.* at 304. Hence, the ultimate outcome of the *IBM, Arbon* and *Hohenberg* and any other future cases involving the interest issue will be fundamentally affected by the decision in this case as will the potential award of interest on all 10,500 claims.

IV. THE FACTORS WHICH LED TO THE GRANTING OF CERTIORARI IN THE FIRST PHASE OF THIS CASE, COUPLED WITH THE CLEAR CONGRESSIONAL INTENT TO AWARD INTEREST IN 28 U.S.C. § 2411 AND 19 U.S.C. § 1505, REQUIRE THAT THE PETITION BE GRANTED TO CORRECT THE ERROR OF THE FEDERAL CIRCUIT'S REFUSAL TO AWARD INTEREST.

The factors that led to the granting of certiorari to the government in the initial phase on the merits of this case apply as well with respect to the award of interest. In that case, certiorari was granted in large part because some 4,000 cases raising this claim were currently stayed in the

CIT. 523 U.S. 360, 365 n.2 (1998). Now no less than 10,500 claims, both judicial and administrative, hang in the balance awaiting the outcome of the decision on the pending petition for certiorari. It is noteworthy that when the government argued for a grant of certiorari on the merits in the first phase of this case, it emphasized the very conditions that are equally present at this stage of the case; namely, -- this case will decide the outcome of thousands of other cases, which collectively involve hundreds of millions of dollars; and no circuit split can arise because the Federal Circuit, by reason of the CIT's exclusive jurisdiction, has jurisdiction over all of the cases.

In filing for certiorari in the first phase of this case, the government argued that "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance," No. 97-372, *Pet. for Cert.* 25, and the government cited, as examples, three cases that *did not involve* constitutional challenges to federal statutes. In the first of these, *United States v. Hill*, 506 U.S. 546 (1993) (No. 91-1421), the government argued as follows (Pet. for Cert. 9):

> The decision in this case misapplies the text and history of section 57 of the Internal Revenue Code to reach an illogical conclusion with dramatic fiscal consequences. The Federal Circuit's decision was issued by a court with nationwide jurisdiction. Since all taxpayers with tax preference income are entitled to pay the tax and sue for refund in the Federal Circuit, and since such taxpayers tend to be professionally counseled, it is unlikely that other courts of appeal will have an opportunity to review this same issue. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions that have great fiscal

> importance. *** Such review is appropriate in this case.

The circumstances in this case are even more compelling for a grant of certiorari than those in *Hill*, because the Federal Circuit is the *only* court in which a challenge to the HMT *can possibly be made.*

In the *Hill* case, the government went on to assert (*Pet. for Cert.* 12-14):

> The fiscal consequences of the decision in this case are enormous. Absent review by this Court, the decision of the Court of Appeals will significantly frustrate the plain intent of Congress . . . .

The government's petition in the *Hill* case also made reference to the decisions in *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (No. 88-1474) and *United States v. American Bar Endowment*, 477 U.S. 105 (1986) (No. 85-599), both involving provisions of the Internal Revenue Code rather than constitutional issues. In its petition for certiorari in *Goodyear Tire & Rubber*, the government argued (*Pet. for Cert.* 8):

> The Court of Appeals has erroneously held that Congress intended the term "accumulated profits" in Section 902 of the code to mean a foreign country's definition of taxable income. The Court's decision thus overturns the construction of the statute that has long been settled. Moreover, the decision is seriously antithetical to the purposes of the statute and will reintroduce some of the disparities in tax treatment that it was designed to eliminate and this major disruption of the statutory scheme rests on an unusually weak foundation – a "plain meaning" discussion that

> manifestly misunderstands the operation of the Section 902 credit.
>
> While the Court of Appeals' decision involves a technical issue, it will have enormous deleterious consequences on the public fisc and on the fair administration of the tax laws if it is permitted to stand * * * [T]he decision below is by a court of nationwide jurisdiction.

Everything that the government argued in *Goodyear Tire & Rubber Co.* applies equally here. The Federal Circuit decision overturned the decision of the CIT which relied on the comprehensive language of Section 2411 to provide interest on *any* refund of *any* taxes imposed under the Internal Revenue Code. Section 2411 provides that:

> In *any* judgment of *any* court rendered *** against the United States *** for *any* overpayment in respect of *any* internal-revenue tax, "*interest shall be allowed . . .*"[Emphasis added]

The HMT is an internal revenue tax imposed under the Internal Revenue Code, 26 U.S.C. § 4461-4462, and is plainly encompassed by the above quoted language. The frustration of the Congressional intent to award interest on such refunds is based essentially on the Federal Circuit's interpretation of the plain meaning of the statute which misunderstands the manifest Congressional intent to award interest on refunds of both taxes and Customs duties. As stated by the government in its petition for certiorari (*Pet. for Cert.* 26):

> [R]eview by this Court is warranted to correct the Court of Appeals' error and restore even-handed administration of this important aspect of the tax laws.

Finally, we submit that the language of the government's petition in the *American Bar Endowment* case, *supra*, applies equally in this case (*Pet. for Cert.* 15):

> [T]he Federal Circuit has ignored both the express language of section 513(c) and Congress' intention in enacting the unrelated business income tax.

In a nutshell, the Federal Circuit's opinion in *IBM* which formed the basis for the decision in this case constitutes a tortured statutory interpretation of section 2411 of Title 28 and section 1505 of Title 19 which completely frustrates manifest congressional intent to award interest on refunds of the HMT. Clearly, section 2411 provides for interest on refunds of any taxes imposed under the Internal Revenue Code, and the HMT, whatever else it may be, is most certainly a tax. As this court noted in the first phase of this case (523 U.S. at 367):

> The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code.

If by reason of any oversight in statutory draftsmanship, Congress failed to make clear that refunds of this tax were to be awarded with interest under section 2411, then the provision for refunds of Customs duties with interest in section 1505 surely fills in the gap. As further noted by this Court in its opinion (*ibid.*):

> *** In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes, the HMT should be treated "as if [it] were a Customs duty." §§ 4462(f)(1)(2).

Therefore, by treating the HMT as though it were a Customs duty in these limited circumstances, Congress also brought it within the purview of section 1505 which provides for an award of interest on a refund of Customs duties. One way or the other, Congress enacted statutory provisions under which any refunds of the HMT would be accompanied by interest. To hold otherwise, as did the Federal Circuit in *IBM* and this case, flies in the face of a clear congressional intent to the contrary as well as the decision of this Court which treats the HMT as both a tax and Customs duty and which affirmed the decision of the CIT which awarded a money judgment in this case "with interest as provided by law."

CONCLUSION

We respectfully submit that the Federal Circuit erred in reversing the decision of the Court of International Trade and holding that interest should not be awarded on refunds of the Harbor Maintenance Tax on exports. For the reasons set forth herein and in the petition for a writ of certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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